

**Pay 'N Save Foods, Inc. and United Food and Commercial Workers International Union, Local 44, AFL-CIO. Case 19-CA-12582**

September 10, 1981

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On April 24, 1981, Administrative Law Judge Richard J. Boyle issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and counsel for the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.<sup>2</sup>

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge that, based on circumstantial evidence, including the size of the plant, the nature of the acoustics of the work facility involved herein, the fact that the employees were not circumspect in their discussions of the Union, the timing of the discharges, and the pretextual reasons asserted for the discharges, the conclusion is warranted that Respondent had knowledge of union activities of the four alleged discriminatees prior to their discharges. See *Syracuse Dy-Dee Diaper Service*, 251 NLRB 963 (1980); *Florida Cities Water Company*, 247 NLRB 755 (1980); and *A to Z Portion Meats, Inc.*, 238 NLRB 643 (1978).

Respondent points to the fact that it had an ongoing relationship with a union (other than the Charging Party Union), which represented certain of its nonmeat market employees, to buttress its contention that it lacked animus toward the Union involved herein. We find that Respondent's animus toward the Union is amply illustrated by the negative reaction of Respondent's president when he was presented with the union wage scale of area meat market employees by one of the dischargees.

<sup>2</sup> Respondent has also excepted to the Administrative Law Judge's Remedy and Order, directing that the employees in question be offered full and immediate reinstatement with backpay, computed in accordance with traditional Board formulas. Specifically, Respondent contends that three of the dischargees either engaged in, or assisted in, improper discounting procedures, thus forfeiting all rights to reinstatement. Based on the record before us, we find that Respondent has failed to establish a sufficient basis to deny reinstatement rights to the dischargees. Respondent is free to offer additional evidence and, based thereon, raise these same contentions at the compliance stage.

Respondent also claims that the fourth employee, Deborah Anderson, is not entitled to an offer of reinstatement because she was previously offered reemployment or had her discharge retracted. Based on credibility resolutions, the Administrative Law Judge found, and we agree, that Anderson had never been offered reemployment to her former position nor had her discharge been retracted.

Member Jenkins would compute interest on the backpay due in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146, 148-150 (1980).

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Pay 'N Save Foods, Inc., Forks, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

**DECISION**

**STATEMENT OF THE CASE**

RICHARD J. BOYCE, Administrative Law Judge: This matter was heard before me in Port Angeles, Washington, on February 24, 1981. The charge was filed on July 8, 1980, by United Food and Commercial Workers International Union, Local 44, AFL-CIO (the Union). The complaint issued on July 30, and alleges that Pay 'N Save Foods, Inc. (Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act, herein the Act, on July 2, 1980, by discharging four employees—Debbie Anderson, Mary Engel, Josie O'Hair, and Pat Russell.

**I. JURISDICTION**

Respondent is a Washington corporation engaged in the operation of a grocery store and restaurant in Forks, Washington. Its annual gross income exceeds \$500,000, and it annually takes delivery in Washington, from outside the State, of goods valued in excess of \$50,000.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

**II. LABOR ORGANIZATION**

The Union is a labor organization within Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Evidence**

On June 18, 1980, Respondent's founder and owner, Russell Thomas, told Respondent's meat department personnel that he was closing the department in 2 weeks, and that they consequently would not be on the payroll after July 2. Four of the department's five employees—Debbie Anderson, Mary Engel, Josie O'Hair, and Pat Russell—indeed ceased working for Respondent upon completion of their shifts on July 2. Alan O'Hair, the department manager and head butcher, also was terminated at that time.<sup>1</sup>

But instead of closing the department, Thomas himself took over as its manager on July 3, staffing it, with two exceptions, with newly hired people. The exceptions were David Crippen, who was transferred from elsewhere in the store, and Rhonda Nesse, who had worked

<sup>1</sup> It is undisputed that Alan O'Hair was a supervisor as defined in the Act. Alan and Josie are husband and wife.

in the department all along on a part-time basis and remained without disruption. Nesse was not at work when Thomas made his June 18 pronouncement, and later was assured by him that it did not apply to her.

Thomas, adamant that he did not discharge the employees in question, but instead "closed the [meat] market and opened it the next day myself under a wholly new operation," testified that the decision was his alone; that he reached it "about a week or probably two weeks before" its announcement, having been considering it for "probably a year"; and that it derived from his conclusion that "the whole attitude of the department had declined to the point where [he] thought it was no longer a viable, profitable business at all." Thomas elaborated that, for "several months," he "personally [had] observed the lack of service, lack of cooperation, and a lack of productivity that was necessary to make money, and a poor attitude"; and that he had "waited too long" to take action.

Thomas added that his "problems were with the general management [Alan O'Hair] and the senior employees," and that "a couple of young people"—Nesse and Debbie Anderson—"had really nothing to do with the attitude and circumstances." Nesse consequently was spared, as above detailed, and Thomas assertedly directed his son Barry, who has the title of assistant store manager, to tell Anderson that she could stay.<sup>2</sup> Thomas disclosed in an affidavit given before the hearing that he "wouldn't have terminated [Anderson] if she hadn't been present on June 18," enlarging that he "didn't want to personally go to each employee; [he] just wanted to end the operation quickly."

Regarding the allegedly poor service, Thomas testified that customers had complained to him, and reportedly to others, about waiting 15 to 20 minutes to place an order; that there had been "many complaints about our lack of selection . . . from time to time"; and that customers had remarked, as well, that "the attitudes were poor" among those in the department. Thomas continued that the complaints were about "the butcher, mainly," which is to say, Alan O'Hair, because of his "failure to serve the people in the manner that they expected." Thomas conceded, however, that not all customer comments were negative—"We also had compliments on the meat market."

Further on the subject of poor service, Thomas related that he was influenced in his decision by the complaint of a customer named Virgil Thayer, who supposedly took his business elsewhere because Alan O'Hair had said Thayer would be charged time and one-half to have a quarter of beef cut. Thomas asserted variously that

Thayer complained of this "about the week following the . . . termination of the market," "probably a week or two before I terminated the market," "the week before" July 2, "a week before the [June 18] meeting with my employees," and that he was "not sure" of the date.

Thomas went on that the decision also was influenced by accounting statements, which professedly revealed the percentage of profit for Respondent's meat department to be "disastrously lower" than the nationally prescribed standard and by word from son Barry that some of the department's employees had been "speaking poorly" of him.

Of those whose terminations are in issue, Engel had been with Respondent about 18 years; Josie O'Hair about 7 years; Russell about 6 years; and Anderson about 2-1/2 years. None had been warned before June 18 that her performance was seriously lacking or her job in jeopardy. Although Thomas assertedly had been considering the action for about a year, he admittedly never mentioned this to the affected employees before June 18, testifying only that he sometimes "made general remarks to the department about our lack of profit, and sometimes about service or a selection in a case." He testified that Engel had been a satisfactory employee "up to the last year or two"; that Josie O'Hair was a "pretty good" employee; and that, as above noted, he did not want to terminate Anderson in the first place.

Thomas shares the management of the store with his oldest son, Bruce, who carries the title of general manager. As between the two, the elder Thomas has the greater authority. He testified that, "generally speaking," Bruce and Barry "both have quite a bit of input or ingress, I might say, into the meat operation." Bruce testified, on the other hand:

It so happens that the meat department has always been his [the father's] domain, so to speak. I have not an awful lot of knowledge about the meat business, and, as a result of that, "I've always relied on my dad to make those decisions because based on his experience with the meat."

Regardless, and even though father and sons supposedly had been in recurrent discussion over the "problems" of the meat department for a year or so, Bruce did not learn of the father's decision until after its disclosure to the employees on June 18. Beyond that, according to Bruce, he learned of it from one of the employees, later verified it with Barry, and did not talk to his father about it until perhaps the next day. Bruce concededly was "very surprised" by the news—"I think we all were." Asked why he was surprised, Bruce explained that his father "didn't say anything to me about it, he just went ahead and made his own arrangements."

Respondent's meat department employees are non-union. The remainder of its employees, except for those in the restaurant, have representation and are under a bargaining agreement. Because that agreement provided for a 7-percent wage increase, to be effective in June 1980, Thomas decided in early June to grant the same increase to the meat department employees. He testified that he wanted "to avoid a lot of problems we run into

<sup>2</sup> Barry testified that he told Anderson, shortly before July 2, that his father had not wanted to let her go, inasmuch as she had not been the cause of any problems, and that Respondent wished to keep her. Anderson replied, according to Barry, that she felt she should "support" the others being terminated, and that she was going to go to school, besides. Anderson testified that Barry told her his father had not wanted to terminate her, but did so because she happened to be among the group he addressed on June 18, and that she responded that she was going to be going to school. To the extent that their versions differ, Anderson is credited. She was a most forthright and convincing witness. It is concluded that Barry's remarks did not constitute a retraction of the discharge or an offer of rehire.

by having different wage schedules." The restaurant employees were not to receive any raise, however, Thomas explaining that "they were just at the point of either losing money or not making any."

In years past, it had been customary for Engel, on behalf of her coworkers in the meat department, to inform Thomas each spring of the union scale for meatcutters, which he then used as a guideline in deciding how much raise to give them. On June 12—6 days before Thomas's announcement—Engel again observed this practice. Thomas, described by Engel as "very upset," responded that the meat department employees would be getting a 7 percent raise "like the rest of the store . . . and that's that." Meatcutters' scale would have meant raises well above that, Engel testifying that it would have increased her hourly pay from \$7.50 to \$9; Russell, from \$6.80 to \$7.90.

Engel reported Thomas's reaction to Alan and Josie O'Hair, and it was decided that Russell should notify the Union of the employees' interest in representation. Russell spoke with Michael Dunn, an official of the Union, that same day, and they arranged for him to meet with the employees at Russell's home on June 18 at 4 p.m.

Between then and the June 18, every day that they worked, the meat department employees engaged in some discussion of the pending meeting and union representation generally; and, at or about 7 a.m. on the June 18, at work, Engel and Russell urged Alan O'Hair to be at Russell's that afternoon, because he knew "the right questions to ask." The record leaves to surmise whether any of this was within earshot of, or otherwise reached, the Thomases. Engel testified that the meat department is "kind of like an echo chamber"; that conversations there can be heard "very plainly all over the store." Respondent had about 35 employees at the time, divided between two shifts, in the grocery portion of its operation.

Thomas told some of the meat department employees at or about 10:30 a.m. on the June 18 that he wanted to meet with them when they were all there; then announced to them at 11:30 that they would not be needed after July 2. He explained that he did not like their attitudes, the service they had been giving, or "anything about the operation."

The employees met with Dunn as scheduled, all signing union authorization cards. By letter dated June 20, Dunn informed Respondent that a majority of the meat department employees had designated the Union as their representative and demanded recognition. According to Thomas' affidavit, receipt of this letter on about June 21 "was the first that I knew of my meat department employees' wanting to be represented by the Union." In his live testimony, Thomas stated that he first learned of the employees' interest in the Union "probably ten days after [he] terminated the market"—i.e., "after July 2." Similarly, son Bruce testified that he first learned of the union activity "maybe four weeks after" the June 18 notification to the employees, when Respondent received notice of the present charge.

#### B. Discussion

Semantics aside, the reality is that the four in question were discharged on June 18, effective July 2. It is con-

cluded, in agreement with the General Counsel, that those discharges violated Section 8(a)(3) and (1).

Among the considerations dictating this conclusion are these:

(a) Although Thomas supposedly had been considering action of this sort for "probably a year," he did not announce it until the very day the employees were to have their first meeting with the Union's Dunn, and within a week after they first contacted Dunn and began talking among themselves about union representation.

(b) Thomas' June 18 announcement was spur of the moment, or nearly so, as revealed by the incongruity of its occurring within days after his decision to give the affected employees a raise; by the testimony of son Bruce, the store's general manager, that he was "very surprised" by it; and by the passage in Thomas' affidavit that he did not bother to exempt Anderson from the sweep of the announcement because he "just wanted to end the operation quickly."

This indicates that a development coming to Thomas' attention on or shortly before the June 18—namely, the employees' interest in the Union—was the likely motivating force, inasmuch as the several "problems" cited by Thomas in support of the action professedly had been of concern for some months.

(c) Apart from their staleness, Thomas' stated reasons for the action lacked conviction. For instance, while the meat department assertedly had ceased to be "a viable, profitable business," Thomas nevertheless had decided to give the department's employees a raise. The restaurant employees, on the other hand, were to be denied a raise, the restaurant being "just at the point of either losing money or not making any."

Further, Thomas' references to customer complaints were for the most part without specificity and thus unconvincing; and, in the one instance that he tried to be specific—the Virgil Thayer matter—he left the record in a state of high confusion whether it came up before or after the June 18 announcement. Beyond that, Thomas' concession that customer complaints were "mainly" against Alan O'Hair, a supervisor, betrays the transparency of such complaints as a reason for discharging those under O'Hair.

Finally, the falseness of Thomas' stated reasons for the discharges is shown by his never having indicated to the employees before June 18, individually or collectively, that their jobs were in jeopardy. That he sometimes "made general remarks to the department about our lack of profit, and sometimes about service or a selection in a case," hardly bespeaks a situation so straitened as to call for a purge.

(d) In all the circumstances, it is inferable that Thomas' recurrent reference to the employees' attitudes, as a ground for the action, was an allusion to their union sympathies. *Virginia Metalcrafters, Incorporated*, 158 NLRB 958, 962 (1966); *Winn-Dixie Greenville, Inc.*, 157 NLRB 657, 662 (1966).

(e) The testimony of Thomas and son Bruce was demonstrably tailored in important areas, revealing their awareness that the truth would be to Respondent's detriment. Thus, despite the statement in his affidavit that he

first learned of the employees' interest in the Union upon receiving the Union's demand letter, Thomas testified that he did not receive that knowledge until much later—"probably ten days after" July 2; and, despite Thomas' testimony that Bruce had "quite a bit of input . . . into the meat operation," Bruce, trying to peddle the notion that there was nothing unusual about his not being privy to the drastic action taken by his father, testified that "the meat department has always been his [the father's] domain."

#### CONCLUSION OF LAW

By discharging Debbie Anderson, Mary Engel, Josie O'Hair, and Pat Russell on June 18, 1980, effective July 2, as found herein, Respondent violated Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>3</sup>

The Respondent, Pay 'N Save Foods, Inc., Forks, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its employees because of their union sympathies or activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under the Act.

<sup>3</sup> All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take this affirmative action:

(a) Offer to Debbie Anderson, Mary Engel, Josie O'Hair, and Pat Russell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings or benefits suffered by reason of their unlawful discharges, with interest on lost earnings.<sup>4</sup>

(b) Preserve and, upon request, make available, to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amounts of backpay and benefits owing under the terms of this Order.

(c) Post at its store in Forks, Washington, the attached notice marked "Appendix."<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>4</sup> Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest shall be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>5</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."